

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket Nos. 7359–7370, 7372

Investigations into the 2007 Integrated Resource)
Plan filings by 13 Municipal Electric)
Departments)

Order entered: 6/18/2010

ORDER RE: REQUEST FOR INTERLOCUTORY REVIEW

These Dockets, plus Docket No. 7371, involve investigations into Integrated Resource Plans ("IRPs") filed by fourteen municipal electric departments.¹ On April 6, 2010, the Hearing Officers in the dockets issued a Procedural Order re: Approval of Integrated Resource Plans (the "April 6 Order"). In the April 6 Order, the Hearing Officers concluded that these dockets would proceed with a review of the fourteen IRPs, notwithstanding the need for the Department of Public Service ("Department") to hire consultants to conduct that review at an estimated total cost of approximately \$140,000 (which costs the Department would intend to bill back to the municipal utilities).

On April 19, 2010, thirteen of the fourteen municipal electric departments whose IRPs are the subjects of these proceedings filed motions for interlocutory review by the Public Service Board ("Board") of the April 6 Order, and represented that the Department agrees with the requests for interlocutory review.² The Municipal Utilities requested, and the Hearing Officers

1. The fourteen municipal utilities are: Barton Village Inc. Electric Department; Village of Enosburg Falls Water & Light Department; Town of Hardwick Electric Department; Village of Hyde Park Electric Department; Village of Jacksonville Electric Company; Village of Johnson Water & Light Department; Village of Ludlow Electric Light Department; Village of Lyndonville Electric Department; Village of Morrisville Water & Light Department; Village of Northfield Electric Department; Village of Orleans Electric Department; Town of Readsboro Electric Light Department; Town of Stowe Electric Department; and Swanton Village, Inc. Electric Department.

2. All of the municipal utilities filed motions except the Village of Lyndonville Electric Department (Docket No. 7371). Twelve of the remaining thirteen municipal utilities (all except the Town of Stowe Electric Department) jointly filed a motion for interlocutory review; the Town of Stowe Electric Department filed a separate motion that is virtually identical to that of the other twelve municipal utilities. For purposes of today's Order, the thirteen

(continued...)

granted, an extension for filing memoranda in support of the motions. The Municipal Utilities filed their supporting memoranda on May 14, 2010.³ In their memoranda, the Municipal Utilities request that the Board "reverse the [April 6 Order] because it is inconsistent with 30 V.S.A. § 218c(b)."⁴

The Department, which is the only other party to these proceedings, did not submit any filings on the motions.

For the reasons explained below, we grant the request for interlocutory review but deny the request to modify the Hearing Officers' determination that these dockets should proceed to a review of the IRPs.

Background

These dockets involve investigations into IRPs that have been filed by fourteen municipal utilities. On January 13, 2010, the Municipal Utilities filed letters noting that as of that date, they had all filed the transmission and distribution ("T&D") portions of their IRPs and that, accordingly, they believed that they had completed their IRP filing requirements. In their January 13 letters, the Municipal Utilities requested that the Board approve their IRPs as filed pursuant to 30 V.S.A. § 218c(b).

In response to the Municipal Utilities' January 13 filings, the Hearing Officers scheduled a status conference and requested that "in advance of the status conference, the parties file proposed schedules for resolution of these proceedings."⁵ On February 16, 2010, the Department filed a letter stating that, due to staffing limitations, it was unable to propose a firm schedule and would need to hire outside contractors to complete its review of the T&D portions of the IRPs. Given the potential costs of the Department's outside contractors, at the February 18, 2010, status conference, the parties requested guidance from the Hearing Officers on whether they should continue to pursue approval of the IRPs from the Board.

2. (...continued)
municipal utilities that filed motions shall be referred to as the "Municipal Utilities."

3. As with the motions, twelve of the thirteen municipal utilities jointly filed one memorandum, while the Town of Stowe Electric Department filed its own memorandum. The two memoranda were virtually identical.

4. Municipal Utilities' Memoranda filed May 14, 2010, at 1.

5. February 4 Memorandum from Judith C. Whitney, Deputy Clerk of the Board.

In order to inform that guidance, on February 25, 2010, the Clerk of the Board issued a memorandum that requested the Department to file an estimate of the costs associated with its proposed use of outside contractors. The February 25 memorandum also encouraged the Department and the municipal utilities to file any comments they believe relevant to the guidance that the parties had requested.

On March 12, 2010, the Department filed a letter providing a "rough" estimate of the costs that would be incurred to review the T&D portion of an IRP for an "average" municipal utility. The Department estimated a total cost of \$140,000 for the fourteen municipal systems, with an average cost of \$10,000 per system. None of the municipal utilities filed a response to the February 25 memorandum.

The April 6 Order

The Hearing Officers issued the requested guidance in the April 6 Order. The Hearing Officers concluded that "these dockets should proceed to review, and consider approval of, the 14 municipal IRPs."⁶ The Hearing Officers cited two reasons in support of their conclusion. As more fully explained in the April 6 Order, they found that "Vermont statute clearly contemplates not only that electric utilities must file IRPs, but also that the IRPs should be reviewed and, if warranted, approved by the Board," and that "sound reasons of public policy call for review of utilities' IRPs."⁷

The Municipal Utilities' Motions

In their motions, the municipal utilities assert that the Board should grant review of the April 6 Order because (1) that order involves a controlling question of law, (2) there is a substantial basis for challenging the correctness of the Hearing Officer's determination on that issue of law, and (3) the Hearing Officers' determination will result in significant resource commitments by the municipal utilities and the Department.

6. April 6 Order at 3.

7. April 6 Order at 2.

In their memoranda in support of their motions, the Municipal Utilities assert that Vermont law does not require approval of electric utility IRPs. The Municipal Utilities rely on the absence of any statutory language that expressly mandates IRP approval. By way of comparison, the Municipal Utilities point to a number of other statutory provisions in which the legislature has expressly required Board approval for certain utility actions.

The Municipal Utilities also note that in the past, the Board has closed IRP dockets without having approved the IRP.

As additional support for their position, the Municipal Utilities cite Board Rule 5.404(B), which provides that a utility without an approved IRP can nonetheless comply with Section 248(b)(6), which provides that a proposed project cannot receive Section 248 approval unless the project is consistent with the utility's approved IRP.

The Municipal Utilities further contend that the preparation and submission of an IRP is a meaningful exercise for an electric utility, the Board and the Department, regardless of whether the utility seeks approval of the IRP. The Municipal Utilities assert that, if it wishes, the Board can always open an investigation into a utility's IRP, just as the Board can with other utility filings for which approval is not required (such as notices of certain contracts under Board Rule 5.202). The Municipal Utilities maintain that, under Section 218c(b), the discretion whether to seek approval of an IRP rests with the utility.

Finally, in the transmittal letters accompanying their memoranda, the Municipal Utilities request oral argument on their motions.

Board Discussion

Before we turn to the specific arguments presented by the Municipal Utilities, it is helpful to place the April 6 Order into context. As that Order itself makes clear, the Hearing Officers issued the Order in response to a request from the fourteen municipal utilities for guidance as to whether this Docket should proceed with a review of their IRPs. The Municipal Utilities, despite having asked for the guidance and having been expressly invited to comment to the Hearing Officers, did not present any comments to the Hearing Officers.

It is neither helpful nor efficient for parties to withhold comments or briefing before a Hearing Officer and then present for the first time their arguments directly to the Board. For cases that are heard by hearing officers, the Board's process is designed to allow the hearing officer to consider all the evidence and argument that the parties wish to present, with the hearing officer then submitting a proposal for decision to the parties for comment and to the Board for its consideration.

Despite the Municipal Utilities' failure to present their arguments to the Hearing Officers when they not only had the opportunity but were expressly encouraged to do so, we grant the request for interlocutory review in order to achieve finality on the procedural issue raised.

Turning to the issue that is the subject of the April 6 Order and the Municipal Utilities' motions for interlocutory review, we begin with the relevant statutory language. Section 218c(b) of Title 30 provides:

(b) Each regulated electric or gas company shall prepare and implement a least cost integrated plan for the provision of energy services to its Vermont customers. Proposed plans shall be submitted to the department of public service and the public service board. The board, after notice and opportunity for hearing, may approve a company's least cost integrated plan if it determines that the company's plan complies with the requirements of subdivision (a)(1) of this section.

The Hearing Officers concluded that the "may approve" language means that "upon review, an IRP should not automatically be approved, but rather should be approved only if warranted under the requirements of Section 218c."⁸ The Municipal Utilities agree in part with the Hearing Officers, maintaining that the "may approve" language "means that Board approval is not mandatory and that, if an electric utility submits its IRP and seeks Board approval, such approval is not automatic."⁹

However, the Municipal Utilities further contend that, in Section 218c(b), "[t]he Legislature left the decision to the electric utilities to determine if seeking Board approval was worth the significant resources required to obtain such approval."¹⁰ We cannot accept this reading of Section 218c. The Municipal Utilities do not point to any provision in the statute to

8. April 6 Order at 2.

9. Municipal Utilities' May 14 Memoranda at 2.

10. Municipal Utilities' May 14 Memoranda at 6.

support their position that review of an IRP is at the discretion of the utility. Instead, the statutory language providing that the *Board* may approve the filed IRP indicates that, if review is discretionary, then the discretion belongs to the Board itself.

We find unconvincing the Municipal Utilities' other arguments in support of their position that review of a filed IRP is not required. The Municipal Utilities cite other, unrelated statutory provisions as examples of mandatory legislative language, but all of the examples cited constitute prohibitions on utility action without prior Board approval, whereas Section 218c affirmatively requires utility action (least-cost integrated resource planning). The fact that the Board has previously closed IRP dockets may merely be indicative of the fact that Section 218c does not mandate approval, as discussed above, or perhaps the Board erred in closing those proceedings without further process. In any event, we are not aware of any such case in which the Board actually ruled on the issue currently before us, nor have the Municipal Utilities apprised us of such a holding. Finally, the provision in Board Rule 5.404(B) for compliance with the requirement of 30 V.S.A. § 248(b)(6) merely reflects session law that was enacted concurrently with the addition of criterion (b)(6) to Section 248.¹¹

However, we need not decide, for purposes of these Dockets, whether Board review of a filed IRP is mandatory. Section 218c(b) requires Vermont utilities to prepare and implement an IRP, and to file the IRP with the Board and the Department. Whether or not Board review of an IRP is required by the statute, we find it incontrovertible that the Board has the authority to conduct such a review. We agree with the Hearing Officers that such reviews should be conducted in these Dockets, because "sound reasons of public policy call for review of utilities' IRPs."¹² As the Hearing Officers further explain,

While there is undoubtedly significant benefit to the utilities and their customers from preparing an IRP, a careful independent review of the IRP can provide substantial additional benefit, and can ensure that the utilities' work-

11. 1991, No. 259 (Adj. Sess.), § 8. It is also instructive to note that the Legislature added subsection (b)(6) to the Section 248 criteria one year after enacting the IRP requirements of Section 218c. Thus, this allowance for Section 248 approval for a utility without an approved IRP presumably was intended by the Legislature to bridge any gap between the effective date of Section 248(b)(6) and the date by which all Vermont utilities would have approved IRPs.

12. April 6 Order at 2.

product satisfies the requirements of Section 218c and appropriately promotes the state's energy policies.¹³

For these reasons, we affirm the Hearing Officers' conclusion that these dockets shall proceed to review, and consider approval of, the Municipal Utilities' IRPs.

The April 6 Order required the parties to file, by April 23, 2010, proposed schedules for review of the fourteen IRPs. We hereby modify this deadline for filing proposed schedules to June 25, 2010.

Pursuant to Board Rule 2.105 and V.R.C.P. 78(b)(2), we deny the Municipal Utilities' request for oral argument on their motions. The Municipal Utilities have had ample opportunity and time to present their written arguments, and have provided no reason why oral argument is needed or appropriate or would further inform the Board's decision.

Finally, we understand that the Municipal Utilities are concerned about the potential consultant costs that the Department intends to bill back to them. We remind the Municipal Utilities that they have the right to petition the Board for a review and determination of the necessity and reasonableness of such costs, pursuant to 30 V.S.A. § 21(a).¹⁴ We also strongly encourage the Department and the fourteen municipal utilities to discuss possible approaches for review of the IRPs that would minimize, or even eliminate, the need for the Department to rely on outside consultants.

These dockets are remanded to the Hearing Officers for further proceedings consistent with this Order.

SO ORDERED.

13. April 6 Order at 3.

14. We also observe that over the last three years the Department has reviewed the IRPs of several other Vermont electric utilities without the need for outside consultants. *See* Docket No. 7454 (City of Burlington Electric Department); Docket No. 7449 (Vermont Electric Cooperative, Inc.); Docket No. 7432 (Washington Electric Cooperative, Inc.); Docket No. 7328 (Vermont Marble Power Division of OMYA, Inc.); Docket No. 7319 (Green Mountain Power Corporation); Docket No. 7284 (Central Vermont Public Service Corporation). However, at the same time it is important to recognize that, subsequent to its review of these other IRPs, the Department has lost a staff person who was directly and substantially involved in IRP review.

Dated at Montpelier, Vermont, this 18th day of June, 2010.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: June 18, 2010

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)